Supreme Court, U.S.
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79-1316

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

FRANKLIN DAVID PASSMORE,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner State of Texas respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this case on April 27, 1979, and November 27, 1979.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit are *Passmore v. Estelle*, 594 F.2d 115 (5th Cir. 1979), and upon motion for rehearing, *Passmore v. Estelle*, 607 F.2d 662 (5th Cir. 1979). These opinions appear in the Appendix hereto at A. 1 and A. 6, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *Passmore v. Estelle* was entered on April 27, 1979. A timely filed motion for rehearing

and for rehearing en banc was granted as to the petition for rehearing. The court below then withdrew a portion of the prior opinion and substituted a new opinion therefor on November 27, 1979.

This petition for writ of certiorari was filed within ninety days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether this Court's decision in *Anders v. California*, 386 U.S. 738 (1967), should apply to retained counsel in state criminal appeals?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

> any person within its jurisdiction the equal protection of the laws.

Tex.Code Crim.Proc. Ann. art. 40.09, §13 (Vernon).

> Upon refusal of the court to grant defendant a new trial, the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal Appeals, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, as well as any unassigned error which in the opinion of the Court of Criminal Appeals should be reviewed in the interest of justice.

Tex.Code Crim.Proc. Ann. art. 42.09 (Vernon).

* * *

> Sec. 3. If a defendant appeals his conviction and is released on bail pending disposition of his appeal, when his conviction is affirmed, the clerk of the trial court, on receipt of the mandate from the appellate court, shall issue a commitment against the defendant. The officer executing the commitment shall endorse thereon the date he takes the defendant into custody and defendant's sentence begins to run from the date endorsed on the commitment. The Department of Corrections shall admit the defendant named in the commitment on the basis of the commitment.
>
> Sec. 4. If a defendant is convicted of a felony and sentenced to death, life, or a term of more than ten years in the Department of Corrections and he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the Court of Criminal Appeals.

> Sec. 5. If a defendant is convicted of a felony and is sentenced to a term of ten years or less and he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending the mandate from the Court of Criminal Appeals upon request in open court or upon written request to the sentencing court. Upon a valid transfer to the Department of Corrections under this section, the defendant may not thereafter be released on bail pending his appeal.
>
> * * *

Tex.Code Crim.Proc. Ann. art. 44.04(d) (Vernon).

> After conviction, either pending determination of any motion for new trial or pending final determination of the appeal, the court in which trial was had may increase or decrease the amount of bail, as it deems proper, either upon its own motion or the motion of the State or of the defendant.

Tex.Code Crim.Proc. Ann. art. 44.33 (Vernon).

> The Court of Criminal Appeals may make rules of procedure as to the hearing of criminal actions upon appeal not inconsistent with this Code. After the record is filed in the Court of Criminal Appeals the parties may file such supplemental briefs as they may desire before the case is heard on oral argument by such court. Each party, upon filing any such supplemental brief, shall promptly cause true copy thereof to be delivered to the opposing party or to the latter's counsel. In every case at least two counsel for the defendant shall be heard in the Court of Criminal Appeals if such be desired by defendant.
>
> Appellant's failure to file his brief in the time prescribed shall not authorize a dismissal of the appeal by the Court of Criminal Appeals, nor shall

> the Court of Criminal Appeals, for such reason, refuse to consider appellant's case on appeal.

STATEMENT OF THE CASE

Respondent was convicted by a jury upon his plea of not guilty in the 47th Judicial District Court of Potter County, Texas, Cause No. 16,348A, for the offense of burglary. On March 31, 1975, Respondent was sentenced to life imprisonment in the Texas Department of Corrections. He pursued a direct appeal to the Texas Court of Criminal Appeals. The circumstances of that appeal were correctly stated in the first opinion of the court below, *Passmore v. Estelle*, 594 F.2d at 116-17; A. 2:

> On appeal, Petitioner retained as counsel Mr. Harris Lofthus, who had not represented him at trial [footnote omitted]. Mr. Lofthus filed a one sentence, thirteen word, brief on Petitioner's behalf, which merely recited a prayer for relief: "Appellant prays that this case be reversed and remanded for a new trial." Although Mr. Lofthus had filed no request for extension of time in which to file a brief as provided by Rule 15 of the Texas Court of Criminal Appeals, Tex.Code Crim.Proc. Ann. art. 44.33 (1979), he submitted a "First Amended Brief" after the deadline for filing had passed. The Texas Court of Criminal Appeals affirmed the conviction in an unreported one paragraph per curiam opinion. Of the one sentence brief, the court observed: "Obviously, this presents nothing for review." Of the "First Amended Brief," the court stated it would not be considered because of its untimely filing. Nonetheless, in the interest of justice, the court examined the record.

The opinion of the Court of Criminal Appeals also states, "[I]n the interest of justice, we have examined the record on appeal and find no reversible error therein." A. 11.

Respondent next filed unsuccessful applications for writ of habeas corpus in both state and federal court before filing the application that forms the basis of this case. The federal district court on February 22, 1979, denied habeas relief. On April 27, 1979, a panel of the United States Court of Appeals for the Fifth Circuit reversed the decision of the district court and held that respondent is entitled to an out-of-time appeal. On motion for rehearing, the panel rewrote part of its opinion, but the disposition remained the same. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court of Appeals Erred by Holding in Effect that the Requirements of *Anders v. California* Apply to Retained Counsel in State Criminal Appeals.

II. The Issue Is One of Continuing National Importance.

III. The National Standards for Effective Assistance of Retained Appellate Counsel Are Wildly Divergent.

ARGUMENT

I. The Fifth Circuit Court of Appeals Erred by Holding in Effect that the Requirements of *Anders v. California* Apply to Retained Counsel in State Criminal Appeals.

The court below considered the one sentence brief filed by respondent's retained counsel in his state appeal

to be so obnoxious that it was impelled to find all his appellate proceedings fundamentally unfair and to order an out-of-time appeal. In the original opinion the court suggested that if respondent's attorney had wished to withdraw after notice of appeal had been filed, he should have so advised the court and requested permission in compliance with *Anders v. California*, 386 U.S. 738 (1967). In the second opinion, the court suggested that the Texas Court of Criminal Appeals should have ordered the case re-briefed, again citing *Anders v. California* in support of that conclusion, 607 F.2d at 663 n. 4; A. 7. In wrongly extending in effect the protections in *Anders v. California* to retained appellate counsel, the court below ignored important realities about the criminal appellate process. It gave insufficient weight to the independent action of the Texas Court of Criminal Appeals, which searched the record for fundamental error and found none.

The decision also wrongly resolves important questions concerning the extent to which state trial judges, appellate judges, and prosecutors should monitor the appellate activities of criminal defendants' retained counsel and the extent to which those said state officials should interfere with the attorney-client relationship. Under its holding, every retained counsel who on appeal files a cursory brief or no brief at all -- which for several reasons is a common occurrence on appeal, as discussed below -- is vulnerable to a charge of ineffective assistance of counsel. To prevent later claims of ineffective assistance of retained counsel under those circumstances, state officials are now charged with the responsibility of interfering with the attorney-client relationship to the extent of apparently demanding explanations for such conduct from retained counsel or rejecting the submitted briefs of such counsel and demanding new ones. Finally, federal district courts are in the business of reviewing the appellate performance of retained counsel. Nothing in *Anders v. California*

authorizes any part of this, and the opinion itself furnishes little guidance upon the extent to which state officials must oversee the performance of retained appellate counsel.

First, the court failed to address the fact that there are several reasons, depending upon the particular law of the jurisdiction, why a convicted defendant might desire his retained attorney to appeal, but not desire such attorney to file and exhaustive brief or to take any other action beyond formal prosecution of that appeal. In Texas, among these reasons is the operation of the state statute governing bond on appeal, Tex.Code Crim. Proc. Ann. art. 44.04 (Vernon). By prosecuting an appeal, a criminal defendant may remain on bond for a longer period of time or, if not on bond, may in certain circumstances remain in the county jail instead of being immediately transferred to the Texas Department of Corrections. *See* Tex.Code Crim.Proc. Ann. arts. 42.09, §5, 44.04(d) (Vernon). For the small price of a formal appeal, a criminal defendant can gain significant advantages.

For these reasons, many appeals are prosecuted in Texas in which only a cursory or no appellate brief is ever filed. By Texas statutes a criminal appeal cannot be dismissed for failure of appellant to file a timely brief. Tex.Code Crim.Proc. Ann. art. 44.33 (Vernon). Now each attorney who so followed the desires of his client and filed such a perfunctory brief is vulnerable to a charge of ineffective assistance of counsel, and his subsequently dissatisfied client, who at the time may well have received all that he wanted -- *including affirmance*, in some cases -- is now entitled to an out-of-time appeal at public expense, assuming that he is now indigent, as will ordinarily be the case.

This holding apparently solicits unwarranted state interference with the attorney-client relationship and

may often, for the reasons state above, require state interference directly contravening the wishes and best interests of the attorney's client. It may also increase the cost of appeals. Presumably the non-indigent client must pay for the "arguable error" brief that his retained counsel must now file. Furthermore, the public must pay for the review of that brief that the appellate judicial system must presumably give it.

Second, the court below reached this result in spite of the independent review by the Texas Court of Criminal Appeals on grounds of error not raised in the briefs in the interest of justice. *See* Tex.Code Crim.Proc. Ann. art. 40.09 §13 (Vernon). The annotations to that statute contain literally hundreds of cases reversed by the Texas Court of Criminal Appeals upon grounds not raised in the briefs, or where no brief at all was filed. These reversals are based on insufficient evidence, defective indictments, invalid guilty pleas, defective jury instructions, ordinary evidentiary error, and virtually every other ground for reversal of a criminal case. The opinion of the Texas Court of Criminal Appeals in this case states that the court had combed the record in the interest of justice and found no fundamental error justifying reversal. Given the respect that the federal courts usually accord the findings of state courts, it is difficult to understand how the court below held the appellate proceedings in respondent's case fundamentally unfair when the Texas Court of Criminal Appeals explicitly stated that no reversible error existed in the case. Thus, any deficiency in respondent's representation was remedied and rendered harmless by the independent action of the Court of Criminal Appeals.

Third, retained counsel in this case filed a presumably adequate expanded brief, but filed it late under the rules of the Court of Criminal Appeals, and so it was not considered. The Court of Criminal Appeals should be

entitled to rely upon its own rules of procedure and time requirements for the filing of briefs, as well as other matters, by retained counsel. In the context of appointed counsel, there is no question that the Texas court takes its duties very seriously. *See Gainous v. State*, 436 S.W.2d 137 (Tex.Crim.App. 1969). Appointed counsel who file late or inadequate briefs are dealt with very severely by the Texas Court of Criminal Appeals; some have been held in contempt of court. *See Talley v. State*, ___S.W.2d___, No. 62,812 (Tex.Crim.App. Jan. 30, 1980). But all courts, including this Court and the court below, have rules of procedure and time limits that must be complied with. Otherwise, the appellate process could quickly become chaotic. Under the holding below, however, the Texas Court of Criminal Appeals, to the extent that it desires to dispose of appeals in one proceeding *and* in compliance with the court below's version of the Constitution, is no longer allowed to enforce its own time deadlines with respect to retained counsel.

To justify all of this, the court below relied upon *Anders v. California*, 386 U.S. 739 (1967). *Anders* set forth the appellate duties of appointed counsel to indigent defendants. It has no application whatsoever in the context of retained counsel and non-indigent defendants. To apply its requirements in the latter context is to require state officials impermissibly to interfere in the attorney-client relationship. Under *Anders*, the state has the obligation to monitor the attorney-client relationship that it has created. But a non-indigent defendant who hires counsel of his choice has himself created an attorney-client relationship. The state has no obligation and far less right, if any, to interfere with that relationship.[1] *See Weathersford v.*

[1]The public is not helpless against inadequate representation by retained counsel in criminal cases. Respondent's attorney in his state appeal was disciplined by the State Bar of Texas, partly because of his conduct in this case. *Passmore v. Estelle*, 594 F.2d at 117 n. 3; A. 3. Also, a malpractice action for damages would be available in certain circumstances.

Bursey, 429 U.S. 545 (1977); *United States v. Morrison*, 602 F.2d 529 (3rd Cir. 1979); *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979).

It should be recalled that this is not a case involving a retained attorney's total abandonment of his client. *See Entsminger v. Iowa*, 386 U.S. 748 (1967). This is a case in which a federal appellate court graded the one sentence, thirteen word performance of retained counsel and found it far short of a passing mark. The scoring of the test was easy in this case, but surely this Court and all others know of many ten sentence briefs, ten page briefs and much longer ones that are so poor as to be little better than a one sentence brief. Is it not a reasonably foreseeable result of the holding of the court below that we shall expect in due time to see many of these briefs attached to federal habeas corpus applications, and consequently the federal courts will be called upon to grade each of them? To prevent that result, the Court of Criminal Appeals is now called upon to grade such briefs in that forum, and to take appropriate remedial action. The Constitution should not require this result.

II. The Issue Is One Of Continuing National Importance.

The requirements of *Anders v. California*, 386 U.S. 738 (1967), are well known. They have been fully implemented in Texas and described in *Gainous v. State*, 436 S.W.2d 137 (Tex.Crim.App. 1969).

The Texas Court of Criminal Appeals is the only appellate court in the state of Texas for criminal matters. Tex. Const. art. 5, §5. The Court of Criminal Appeals has the heaviest caseload of any state appellate court in the nation. *Talley v. State*, ___S.W.___, No. 62,812 (Tex.Crim.App. Jan. 1980). In 1978, for example, the Court of Criminal Appeals disposed of 2,634 cases. In 1978 the nine judges, and three commissioners, and one special judge of the Court of Criminal Appeals

authored 2,878 *signed opinions.* On December 31, 1978, there were 5,141 cases pending upon the docket of that court. 50th Ann. Rep., Texas Judicial Council & Office of Court Administration at 129-30 (May, 1979).

No great prescience is necessary to understand that if the Texas Court of Criminal Appeals is required to monitor and grade the performance of retained, as well as appointed, appellate counsel, its continuing efforts to achieve control over its massive docket will be severely hampered. If the Court of Criminal Appeals is not entitled to rely upon the efforts and implied representation of retained counsel as well as its own rules of procedure and filing deadlines, the impact upon its work is potentially disastrous. In light of the conflicting holdings among other American jurisdictions (*see* part III below), it is inevitable that other states will to some degree face the same problem.

The impact upon the federal courts must be equally substantial. In his specially concurring opinion in the court below, Judge Coleman wrote:

> By my concurrence I do not intend to be lending support to the idea that the state appellate courts must now review all briefs as to the competency and adequacy of the representation afforded by retained counsel in order to foreclose claims of imcompetency of counsel or inadequacy of representation at the appellate level, especially where, for all we know, the filing may be simply for delay or for some other reason not really based on any real hope of reversal.
>
> * * *
>
> I must express the hope that this case will not become the vehicle by which overburdened federal courts are to begin reviewing the competency and adequacy of retained appellate counsel in state courts.

Passmore v. Estelle, 607 F.2d at 664; A. 10.

Petitioner shares Judge Coleman's hope, but perceives no basis for believing that state prisoners in federal habeas corpus will not now seek review of the performance of their retained counsel in their state appeals, since the majority opinion in the court below created exactly that cause of action as a constitutional right.

III. The National Standards for Effective Assistance of Retained Counsel Are Wildly Divergent.

Judge Coleman in the court below commented upon the paucity of precedent on incompetency of counsel or inadequate representation in state court appeals. 607 F.2d at 664; A. 10. Review of available authorities reveals wildly divergent results in this area. Prior to the holding in the instant case, the Fifth Circuit had refused to grant habeas corpus relief in numerous cases involving even total abandonment by retained counsel. *E.g., Perez v. Wainwright*, 594 F.2d 159 (5th Cir. 1979); *Edwards v. Louisiana*, 520 F.2d 321 (5th Cir. 1975), *cert. denied*, 423 U.S. 1089 (1976); *Kallie v. Estelle*, 515 F.2d 588 (5th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *Malone v. Alabama*, 514 F.2d 77 (5th Cir.), *cert. denied*, 423 U.S. 990 (1975). Similarly, the Tenth Circuit Court of Appeals, as well as the State of Oklahoma, have held that nothing in either *Anders v. California*, or *Entsminger v. Iowa*, 386 U.S. 748 (1967), renders fundamentally unfair the appeal of a convicted defendant whose retained counsel files no brief or presents no oral argument, at least where the Oklahoma Court of Criminal Appeals has examined the record for "fundamental error." *Hill v. Page*, 454 F.2d 679, 681 (10th Cir. 1971).

Some other jurisdictions have applied *Anders* in varying degrees to the performance of retained appellate counsel. Some have written that performance of retained counsel on appeal can in certain circumstances amount to denial of the constitutional right to counsel. *E.g., Woodall v. Neil*, 444 F.2d 92 (6th Cir. 1971); *Shiflett v. Virginia*, 433 F.2d 124 (4th Cir. 1970), *cert. denied sub nom. Love v. Virginia*, 405 U.S. 994 (1972). Others have simply delineated wildly divergent standards for grading the performance of appellate counsel, without necessarily differentiating between retained and appointed counsel. *E.g., People v. Lang*, 520 P.2d 393, 398 (Calif. 1974) (whether "appellate counsel failed to raise crucial assignments of error which arguably might have resulted in reversal"); *Commonwealth v. Sullivan*, 371 A.2d 468, 474 (Pa. 1977) (whether counsel's actions had a reasonable basis designed to effectuate the client's interests in light of all the alternatives); *People v. Frank*, 272 N.E.2d 25, 28 (Ill. 1971) (inquiring whether issue was so patently meritorous that failure to raise it on appeal was ineffective assistance); *State v. Parsley*, 354 N.E.2d 185, 187 (Ind. 1976), and *Grant v. State*, 343 S.W.2d 626, 627 (Tenn.Crim.App. 1975) (both evaluating the underlying merits of the alleged errors counsel failed to raise on appeal.) *See* Strazzella, "Ineffective Assistance of Counsel Claims: New Uses, New Problems," 19 Ariz. L.Rev. 443, 464-71 (1977).

This Court should revolve these conflicting standards.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Franklin David PASSMORE,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 78-1963.

United States Court of Appeals,
Fifth Circuit.

April 27, 1979.

Appeal from the United States District Court for the Northern District of Texas.

Before COLEMAN, GODBOLD and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge:

Petitioner Franklin David Passmore, a Texas state prisoner, appeals the denial of his application for a federal writ of habeas corpus. Two issues are before the court: (1) whether the state trial court's ruling that defense counsel could not impeach a prosecution witness by evidence of prior incarceration violated petitioner's Sixth Amendment right to confrontation; and (2) whether petitioner's retained counsel rendered ineffective assistance on appeal in submitting a one sentence appellate brief. We affirm the denial of federal habeas relief as to the first issue, but reverse and remand as to the second issue.

Petitioner was convicted in a Texas state district court of the offense of burglary and was sentenced to life imprisonment as an habitual offender. The chief prosecution witness was petitioner's accomplice, Mr. Jimmy Chambers. During cross-examination of

Chambers, petitioner's counsel twice asked the witness if he had been in jail since his arrest for the burglary. On both occasions, the court sustained the government's objection to the question.

On appeal, petitioner retained as counsel Mr. Harris Lofthus, who had not represented him at trial.[1] Mr. Lofthus filed a one sentence, thirteen word, brief on petitioner's behalf, which merely recited a prayer for relief: "Appellant prays that this case be reversed and remanded for a new trial." Although Mr. Lofthus had filed no request for extension of time in which to file a brief as provided by Rule 15 of the Texas Court of Criminal Appeals, Tex.Code Crim.Proc. art. 44.33 (1979), he submitted a "First Amended Brief" after the deadline for filing had passed. The Texas Court of Criminal Appeals affirmed the conviction in an unreported one paragraph per curiam opinion. Of the one sentence brief, the court observed: "Obviously, this presents nothing for review." Of the "First Amended Brief," the court stated that it would not be considered because of its untimely filing. Nonetheless, in the interest of justice, the court examined the record.

Proceeding in forma pauperis, petitioner exhausted state remedies before filing an application for federal habeas corpus relief under 28 U.S.C. § 2254 (1976). On February 22, 1978, the district court denied the application for writ of habeas corpus in accordance with the Report and Recommendation of the United States Magistrate.

[1] Petitioner argues that the state trial court's ruling that defense counsel could not impeach a prosecution witness by evidence of his incarceration

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[1]Petitioner retained different counsel at each stage of the proceedings. At arraignment and plea, petitioner retained Mr. Ronnie Posey. At trial, petitioner retained Mr. Charles Fairweather. On appeal, petitioner retained Mr. Lofthus.

violated the confrontation clause of the Sixth Amendment. We find no merit in petitioner's argument. The court's ruling was dictated by Article 38.29 of the Texas Code of Criminal Procedure which forbids impeachment by past criminal misconduct unless a final conviction has been entered.[2] Application of the statute by the trial court did not unduly restrict cross-examination in violation of the Sixth Amendment. *Cf. United States v. Mayer*, 556 F.2d 245, 248-49 (5th Cir. 1977); *United States v. Crumley*, 565 F.2d 945, 949-50 (5th Cir. 1978).

Petitioner's second argument is that his retained counsel rendered ineffective assistance on appeal in submitting a one sentence brief.[3] In this circuit, a criminal defendant is entitled to "counsel reasonably likely to render and rendering reasonably effective assistance." *United States v. Guerra*, 588 F.2d 519 (5th Cir. 1979), quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), modified 289 F.2d 928, *cert. denied*, 368

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[2]Tex.Code Crim.Proc. art. 38.29 (1966) provides:

> The fact that a defendant in a criminal case, or a witness in a criminal case, is or has been charged by indictment, information or complaint, with the commission of an offense against the criminal laws of this State, of the United States, or any other State shall not be admissible in evidence on the trial of any criminal case for the purpose of impeaching any person as a witness unless on trial under such indictment, information or complaint a final conviction has resulted, or a suspended sentence has been given and has not been set aside, or such person has been placed on probation and the period of probation has not expired. In trials of defendants under Article 36.09, it may be shown that the witness is presently charged with the same offense as the defendant at whose trial he appears as a witness.

[3]At oral argument before this court, petitioner's counsel informed the court that Mr. Lofthus had been suspended from the practice of law for ten months by the State Bar of Texas Grievance Committee because of his conduct of petitioner's appeal. *See Lofthus v. State*, 572 S.W.2d 799, 800 (Tex.Civ.App.-Amarillo, 1978).

U.S. 877, 82 S.Ct. 821, 7 L.Ed.2d 78 (1961). Review of an ineffective assistance claim "requires an inquiry into the actual performance of counsel . . . and a determination whether reasonably effective assistance of counsel was rendered based on the totality of the circumstances." *Carbo v. United States*, 581 F.2d 91, 92 (5th Cir. 1978).

[2] Ineffective assistance of counsel in state court may be predicated upon either the due process clause of the Fourteenth Amendment or the assistance of counsel clause of the Sixth Amendment. The Fourteenth Amendment is violated when retained counsel's representation is " 'so grossly deficient as to render the proceedings fundamentally unfair'." *Kallie v. Estelle*, 515 F.2d 588, 591 (5th Cir. 1975); *Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1975). The Sixth Amendment is violated when retained counsel's incompetent representation is "so apparent that a reasonably attentive official of the state should have been aware of and could have corrected it." *Id.* at 1337.

[3] The conduct of petitioner's retained appellate counsel was so maladroit as to run afoul of the Fourteenth Amendment. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus curiae*. . . . His role as advocate requires that he support his client's appeal to the best of his ability." *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967).

The submission of a one sentence brief by Mr. Lofthus was tantamount to abandonment of representation. It is well settled that appellate counsel "may not abandon representation in his own *ipse dixit*." *Wright v. Estelle*, 572 F.2d 1071, 1083 (5th Cir. 1978). If counsel wishes to withdraw after notice of appeal has been filed, "he should so advise the court and request permission to

withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400; *Barker v. Wainwright*, 459 F.2d 8, 10 (5th Cir. 1972). Like the no-merit letter submitted by appellate counsel in *Anders*,[4] the one sentence brief submitted by Mr. Lofthus failed to meet the minimum constitutional requirement of effective assistance of counsel on appeal.

The state trial court's ruling that defense counsel could not impeach a prosecution witness with evidence of his jail record comported with state law and did not violate the confrontation clause of the Sixth Amendment. Submission of a one sentence brief by retained appellate counsel, however, denied petitioner the effective assistance of counsel required by the Fourteenth Amendment. Accordingly, the district court's denial of the application for a writ of habeas corpus is affirmed in part and reversed and remanded in part. Upon remand, the district court is instructed to enter an order granting the petition for writ of habeas corpus unless the courts of Texas shall grant and afford the petitioner a new and out-of-time appeal, the time of which shall run from the date of district court's order.

AFFIRMED in part, REVERSED and REMANDED in part.

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[4]In *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the issue before the court was whether appointed counsel had rendered ineffective assistance on appeal of a felony conviction to a California appellate court, when counsel had advised the court that there was no merit to the appeal. Counsel wrote the following letter to the appellate court: "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained may views and opinions to him. . . ." The Supreme Court held that such representation amounted to ineffective assistance of counsel under the Fourteenth Amendment. *Id.* at 744, 87 S.Ct. 1396.

Franklin David PASSMORE,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 78-1963.

United States Court of Appeals,
Fifth Circuit.

Nov. 27, 1979.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 27, 1979, 5 Cir. 1979, 594 F.2d 115)

Before COLEMAN, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

The petition for rehearing is granted.

Our original opinion, 594 F.2d 115, is modified by withdrawing the language beginning with the last full paragraph on page 117 and continuing to the end of the opinion and substituting the following therefor.

[1, 2] It is obvious that the representation by petitioner's retained appellate counsel was incompetent.[4] Constitutionally ineffective assistance of counsel in state court may be predicated upon either the due process clause of the Fourteenth Amendment or the assistance of counsel clause of the Sixth Amendment.[5] *See Fitzgerald v. Estelle*, 505 F.2d 1334, 1335-37 (5th Cir. 1975) (en banc).

In the first situation, we say that constitutionally ineffective assistance of retained counsel occurs when the whole proceeding is fundamentally unfair. In other words, "the criminal justice system has so grossly malfunctioned that the state's subsequent imprisonment or fine of the defendant is a violation of due process. . . . Fourteenth Amendment state action is present, not because a state official knew or should have known the particulars of the unfairness but because the system has failed." *Cantrell v. Alabama*, 546 F.2d 652, 653 (5th Cir. 1977) (citation omitted).

In the second situation, state action is present, not because the whole proceeding is "fundamentally unfair" but rather because a state official knew or should have known of the "particulars of the unfairness." *Id.* The language of *Fitzgerald v. Estelle, supra*, quoted in *Cantrell v. Alabama, supra*, concerning the Sixth Amendment denial of assistance of counsel is:

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[4]The submission by Mr. Lofthus of a one sentence appellate brief on behalf of one whose conviction has resulted in a life sentence as a habitual offender can hardly be said to reflect the "role of an active advocate in behalf of his client's." *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967).

[5]The Sixth Amendment right of an accused to assistance of counsel was made obligatory on the states by the Fourteenth Amendment in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

To find state involvement in retained counsel's conduct which is adjudged to be less than reasonably effective, yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some responsible state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused. That the trial judge and the prosecutor have such a capacity and duty is unquestionable. Therefore, if the trial judge or the prosecutor can be shown to have actually known that a particular defendant is receiving incompetent representation and takes no remedial action, the state action requirement is satisfied. If they directly participate in the incompetency, it is even more so. Furthermore, if the incompetency of a retained attorney's representation is so apparent that a *reasonable attentive official of the state should have been aware of and could have corrected it* then again the state action requirement is satisfied.

Fitzgerald, supra, 505 F.2d at 1337 (emphasis added).

It is abundantly clear that the Texas Court of Criminal Appeals had actual knowledge that petitioner was receiving incompetent representation and took no remedial action. The per curiam opinion noted that "[o]bviously, this [one sentence brief] presents nothing for review." This case is not unlike *Cantrell v. Alabama, supra*, where, after an uncertified transcript had been filed, the attorney general moved to dismiss the appeal because of the lack of a certificate. The court noted that the state's highest legal officer had actual knowledge of the defective assistance of counsel at a time when the error could have been corrected. *Cantrell, supra*, 546 F.2d at 654.

In the instant case, the Texas Court of Criminal Appeals could have ordered petitioner's counsel to rebrief the case before disposition of the appeal,

especially since counsel had attempted untimely to submit a "First Amended Brief," which the Court refused to consider. As in *Cantrell*, the Constitution requires more than what was afforded petitioner.

[3, 4] The state trial court's ruling that defense counsel could not impeach a prosecution witness with evidence of his jail record comported with state law and did not violate the confrontation clause of the Sixth Amendment. Submission of a one sentence brief by retained appellate counsel, however, denied petitioner the effective assistance of counsel required by the "incorporated" Sixth Amendment. Accordingly, the district court's denial of the application for a writ of habeas corpus is affirmed in part and reversed and remanded in part. Upon remand, the district court is instructed to enter an order granting the petition for writ of habeas corpus unless the courts of Texas shall grant and afford the petitioner a new and out-of-time appeal, the time of which shall run from the date of the district court's order.

AFFIRMED in part, REVERSED and REMANDED in part.

COLEMAN, Circuit Judge, concurring specially.

I was so appalled by the filing of a one-line brief by retained counsel in a criminal appeal that I concurred in the prior opinion in this case, reported at 594 F.2d 115. Upon it being brought to the attention of the panel that we were in conflict with the decision of another panel, *Perez v. Wainwright*, 594 F.2d 159 (5th Cir.), rendered almost simultaneously and which we did not know about, the above revised opinion is being issued, authored by Judge Ingraham and concurred in by Judge Godbold.

I concur in this opinion because it directs only that Passmore be given an out of time appeal. If his

conviction was being subjected to outright invalidation I would most certainly dissent.

I wish, however, to make a record of some of my reservations about my concurrence. The solemn judgment of the Texas Court of Criminal Appeals, in which the retained lawyer filed the one-line brief, recites that the Court had made an independent evaluation of the record and had found no error. This means that the lawyer's dereliction hardly resulted in any prejudice to Passmore. The better course would be to apply the harmless error rule of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. The out of time appeal is probably going to be a waste of time and effort on the part of both counsel and the Texas appellate court. Therefore, if I were deciding this case individually I would apply the harmless error rule and affirm the District Court.

By my concurrence I do not intend to be lending support to the idea that state appellate courts must now review all briefs as to the competency and adequacy of the representation afforded by retained counsel in order to foreclose claims of incompetency of counsel or inadequacy of representation at the appellate level, especially where, for all we know, the filing may be simply for delay or for some other reason not really based on any real hope of reversal.

I have searched the federal constitutional precedents and I find almost nothing on incompetency of counsel or inadequate representation in state court appeals. The hundreds of precedents in this area deal with what happened at the original trial on the merits, where the focal issue of guilt or innocence was at stake.

I must express the hope that this case will not become the vehicle by which overburdened federal courts are to begin reviewing the competency and adequacy of retained appellate counsel in state courts. As a Sixth

Amendment matter, when a defendant is represented by retained counsel and a state court tells us that it has reviewed the record in an ordinary felony case, such as we have here, and found no error I think we should accept that unless the habeas corpus applicant can cite chapter and verse to show that the state appellate court was clearly wrong, to the prejudice of his constitutional rights.

IN THE TEXAS COURT OF CRIMINAL APPEALS

FRANKLIN PASSMORE,
Appellant

No. 51,792 vs. Appeal from Potter County

THE STATE OF TEXAS,
Appellee

OPINION

Appellant was found guilty by a jury of the offense of burglary. His punishment enhanced by two prior felony convictions was assessed by the court at life. Appellant was represented by retained counsel at trial and by different retained counsel on appeal. Appellant's original brief consisted of one sentence: "Appellant prays that this case be reversed and remanded for new trial." Obviously, this presents nothing for review. The record was approved on July 24, 1975 and on September 15, 1975 appellant filed his "First Amended" brief. The record is devoid of any request for or granting of an extension of time within which to file this brief. Therefore, the brief not having been timely filed, it will not be considered. However, in the interest of justice, we have examined the record on appeal and find no reversible error therein. In addition to the accomplice testimony there was other evidence *tending* to connect appellant with the offense committed. Cherb v. State, 472 S.W.2d 273.

The judgment is affirmed.

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Per Curiam

(Delivered June 30, 1976)